

Court of Appeals, State of Michigan

ORDER

People of MI v Thomas Allen Gusman

Docket No. 290372 & 291655

LC No. 2008-000146 FC

Deborah A. Servitto
Presiding Judge

E. Thomas Fitzgerald

Jane M. Beckering
Judges

The Court orders that the April 20, 2010 opinion is hereby AMENDED. The opinion contained the following clerical error: Page 2, full paragraph 3: In the first sentence, correct the state of "Texas" to "Wisconsin".

In all other respects, the April 20, 2010 opinion remains unchanged.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAY 18 2010
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

THOMAS ALLEN GUSMAN,

Defendant-Appellee.

UNPUBLISHED

April 20, 2010

No. 290372

Gogebic Circuit Court

LC No. 08-000146-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS ALLEN GUSMAN,

Defendant-Appellant.

No. 291655

Gogebic Circuit Court

LC No. 2008-000146-FC

Before: SERVITTO, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

This is a consolidated interlocutory appeal. In Docket No. 290372, plaintiff appeals as on leave granted¹ the order denying plaintiff's motion in limine seeking to exclude other acts evidence. In Docket No. 291655, defendant appeals as on leave granted the order denying his motion to certify the materiality of out of state witnesses in order to secure their presence for trial under MCL 767.93. We affirm in part and reverse in part.

Defendant is charged with one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (person under 13), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (person under 13), based on allegations that he sexually assaulted a

¹ Our Supreme Court has remanded these matters to this Court for consideration as on leave granted. *People v Gusman*, ___ Mich ___; 774 NW2d 525 (2009).

girlfriend's five-year-old daughter (the complainant) in his cabin while her mother was asleep. The complainant gave several different descriptions of the activity that took place, and in counseling sessions she also stated that she had been assaulted by another one of her mother's boyfriends – a person named Mike.

In the course of the investigation, defendant obtained information that, in another matter, the complainant's mother had used a promise of chocolate to induce the complainant to accuse another one of the mother's friends of hitting her. Wisconsin police investigating the alleged assault overheard the mother.

Plaintiff filed two motions in limine seeking to exclude evidence regarding the sexual assault by another one of the mother's boyfriends under the rape shield statute, MCL 750.520j, and to exclude evidence that the mother had tried to influence the complainant into making allegations of assault against another of the mother's boyfriend in the past. The trial court heard arguments on the motions of February 5, 2009.

As to the motion concerning the mother's behavior, the prosecutor stated that the matter arose in a Hurley, Texas, Police Department investigation on October 1, 2005. The police report indicated that the complainant's mother had called and complained that a man named Mickey Francis had hit her daughter and left bruises on the child's back. The complainant's mother brought her into the police station, where the complainant was interviewed by a social worker. The complainant's mother coached the girl to tell police who hit her. When the complainant went into the bathroom with her mother, an officer overheard the complainant's mother tell her that she would give her some chocolate if she told the police that Mickey hit her. The complainant would only say that she hit herself on the corner of something.

Defendant asserted that he had not been able to question the complainant's mother, and the evidence would indicate that there were credibility questions concerning the complainant and her mother. The court stated that this was simply an issue concerning credibility. It noted that while the evidence may not be admissible under MRE 608(b), it was circumstantial evidence of the likelihood that the child was pressured or manipulated into accusing defendant. The court denied the motions in limine, finding that the evidence was admissible under *People v Jackson (After Remand)*, 477 Mich 1019 (2007), and did not implicate the rape shield law.

The second motion concerned allegations of abuse that were revealed when the complainant became enrolled in counseling in Texas, after she had been placed in her father's custody. The complainant told her counselor that she had been sexually abused by another one of her mother's boyfriends, a man named Mike. Authorities spoke with the mother, who identified the boyfriend as a man who lived in Michigan. The matter was referred to Iron County Wisconsin, but no investigation was performed. There were three men named Mike in the mother's life, and they were not sure which Mike was actually involved. The prosecutor contacted the protective services worker in Texas, who said that she would re-interview the complainant and attempt to obtain more details. That interview had yet to be conducted.

The court denied the second motion in limine. The court stated that if the complainant was telling the truth about the allegations, they were sufficiently close in time that there might be some confusion in the mind of a five-year-old about the events. On the other hand, if the complainant were not telling the truth about Mike, the evidence would nevertheless be

admissible to support the defense theory that the complainant had a motive to fabricate that would be applicable to both Mike and defendant. The court stated that under either scenario the rape-shield statute was inapplicable.

Defendant thereafter moved to certify Texas witnesses Lindsay Dula, Joy Hallum, and Dr. Yvette Phillips, in order to secure their presence at trial. Dula and Hallum are investigators with the Texas child protective services agency, and Phillips is a counselor. Defendant argued that the testimony would have a bearing on the credibility of the complainant's allegations against defendant. After hearing argument, the court denied the motion, observing that defendant sought to introduce the testimony as extrinsic evidence of prior inconsistent statements from a child witness who had yet to testify. The court found that the evidence was not directly exculpatory, and that it would not be material. The court noted that the transcripts of interviews and interview notes from the three witnesses could be used as extrinsic evidence without calling the witnesses.

DOCKET NO. 290372

Plaintiff first argues that the trial court abused its discretion in denying plaintiff's motion to exclude evidence of the complainant's mother's earlier attempt to induce the complainant to fabricate a claim of assault against another of the mother's male friends. Plaintiff argues that the evidence would be collateral, and should be excluded as improper character evidence under MRE 608(b). We review a trial court's decision to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, to the extent that review requires examination and interpretation of a statute or the rules of evidence, this Court reviews those questions of law de novo. *Id.* An abuse of discretion occurs "when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MRE 608(b) provides in pertinent part:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness credibility . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

MRE 608(b) is concerned with specific instances of conduct used for the purpose of attacking or supporting a witness's credibility. Plaintiff contends that the complainant's mother's credibility is not at issue because the complainant made the present allegation. However, the trial court found that the evidence would be relevant to show that the complainant's mother exerted

pressure or manipulation on the complainant. To the extent that defendant wishes to use the evidence as substantive evidence, MRE 608(b) is inapplicable.²

The evidence of the pressure to make false allegations is admissible under MRE 404(b). See *Jackson (After Remand)* 477 Mich at 1019. Unlike MRE 608(b), which is concerned with a witness's character for truthfulness or untruthfulness, MRE 404(b) requires evidence relevant to a non-character theory. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). MRE 404(b) provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The rule is not limited to a criminal defendant's acts; it includes the acts of any person. *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991). Under MRE 404(b)(1), evidence of prior bad acts is admissible if (1) the evidence is offered for a purpose other than a prove propensity, (2) is relevant under MRE 402, and (3) its probative value is not substantially outweighed by unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

In this case, the trial court did not abuse its discretion because the evidence is logically relevant as substantive evidence under MRE 402, will not be admitted for the forbidden propensity inference, and its probative value is not substantially outweighed by unfair prejudice under MRE 403. *Id.* Evidence is logically relevant if it has any tendency to make the existence of any fact that is of consequence to the action more or less probable than it would be without the evidence. *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993); MRE 401. Here, the trial court correctly found that the evidence was relevant to a fact in issue, namely, whether the complainant was pressured or manipulated into accusing defendant. The evidence is also highly relevant to defendant's defense, because it relates to the complainant's motive for making the accusations against defendant.

Finally, a review of the record demonstrates that the trial court appropriately balanced the probative value of the evidence against its danger of unfair prejudice. While plaintiff asserts that

² We recognize that testimony concerning this earlier coaching incident also involves a specific instant of conduct concerning the complainant, because she was involved in her mother's alleged attempt to falsely accuse the previous boyfriend. However, unlike the evidence concerning the prior false allegation discussed below, the testimony concerning this prior incident will presumably not be used to directly attack the complainant's credibility or reputation for truthfulness. According to the evidence presented on the record, the complainant did not in fact falsely accuse the boyfriend, but instead stated that she had bumped herself on a corner. Thus, absent any indication that MRE 608 is applicable, we find plaintiff's argument without merit.

the complainant came forward independent of her mother, the possibility exists that the mother planted the original idea. The absence of direct evidence that the complainant's mother actually pressured the complainant goes to the weight and value of the circumstantial evidence that the complainant was pressured or manipulated into accusing defendant, not its admissibility. This Court will not assess the weight and value of evidence when reviewing a trial court's decision to admit evidence. *Cole v Eckstein*, 202 Mich App 111, 113-114; 507 NW2d 792 (1993). Given the potential relevance of the evidence, there is no showing that the trial court abused its discretion in finding the evidence admissible.

Plaintiff also contends that the trial court erred by finding that the rape shield statute did not apply to the complainant's allegations concerning Mike. We disagree.

The rape-shield statute, MCL 750.520j, provides in part:

(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

The rape-shield statute was enacted to combat "the then-existing practice of impeaching the complainant's testimony with evidence of the complainant's prior consensual sexual activity, which discouraged victims from testifying" because they feared cross-examination of their private lives. *People v Adair*, 452 Mich 473, 480; 257 NW2d 268 (1997). The statute is based on the premise that a witness's sexual history with others is generally irrelevant to a witness's character for truthfulness or with respect to an alleged sexual assault. *Id.* at 481. However, in limited situations, evidence of sexual conduct is relevant and its admission is required to preserve the defendant's constitutional right to confrontation. *Id.* at 484.

In *People v Williams*, 191 Mich App 269; 477 NW2d 877 (1991), this Court held that the rape-shield statute permits the introduction of evidence that a complainant made prior false accusations of criminal sexual conduct. This Court stated that the evidence was relevant in a subsequent prosecution because the fact that complainant made prior false accusations of criminal sexual conduct bore on the complainant's credibility and credibility of the complainant's accusations in the subsequent case. *Id.* at 272, citing *People v Hackett*, 421 Mich 338, 348-349; 365 NW2d 120 (1984). This Court stated that the "preclusion of such evidence would unconstitutionally abridge the defendant's right to confrontation." *Williams*, 191 Mich App at 272.

Here, the trial court did not abuse its discretion in concluding that the evidence would be admissible. It is clear that the rape-shield statute does not preclude introduction of evidence to

show that a complainant has made a prior false accusation of criminal sexual conduct. *Williams*, 191 Mich App at 272. See also *Jackson*, (*After Remand*), 477 Mich 1019. Thus, if the complainant's allegations against Mike are false, the rape-shield statute does not preclude their introduction. During the complainant's October 30, 2008 interview with protective services, she said that a "Mike," who was "almost [her] mom's boyfriend" sexually assaulted her. More recently, however, during a February 6, 2009 interview, the complainant said that "Tommy [defendant] and Mike and Carl" "did really mean stuff," but she denied being sexual assaulted by anyone other than defendant. Thus, based on the complainant's own statement that Mike did not sexually assault her, defendant has provided sufficient evidence that her prior allegations were false, and the rape-shield statute does not preclude their introduction.

Plaintiff argues that because the complainant's allegations are still under investigation by police, they may not be false allegations and thus cannot be excluded from the rape-shield statute. However, even assuming that the complainant's allegations against Mike are true, there is no question of protecting her sexual activity privacy when she was only five years' old, and the evidence in question involved another assault on her. As the trial court correctly concluded, the fact that the complainant has accused Mike is probative of the defense theory that the allegations were sufficiently close in time that the complainant might be confusing defendant with Mike. Moreover, because the complainant's accusations bear on her credibility in accusing defendant, not permitting him to introduce this evidence would be a violation of his right to confrontation. *Williams*, 191 Mich App at 272.

Plaintiff also argues that this Court committed palpable error by not conducting an evidentiary hearing to determine whether the allegations are "demonstrably false." Plaintiff argues that our Supreme Court's decision to remand a similar case to the circuit court for an evidentiary hearing, *People v Parks*, 478 Mich 910; 733 NW2d 14 (2007), requires a showing that the other allegation of sexual assault be "demonstrably false." However, in the immediate case, the record supports a finding of fabrication. Moreover, the alleged incidents of abuse involving Mike and defendant were said to have occurred very close together in time, thus supporting defendant's defense that the complainant may have confabulated the two incidents. Thus, no evidentiary hearing to determine whether the allegations were true or false is required.³

DOCKET NO. 291655

Defendant argues that the trial court abused its discretion in denying his motion to certify the materiality of out of state witnesses because the testimony of the out-of-state witnesses was necessary to preserve his right to present a defense and right to compulsory process. Defendant asserts that the trial court gave improper weight to the convenience of the witnesses and materiality of the testimony in denigration of defendant's constitutional rights. A trial court's

³ We note that, while the plaintiff mentions MRE 608 in its appellate discussion concerning this issue, and its attempt to have this Court adopt its chosen standard of review, it does not raise it as a bar to the introduction of the prior false allegation. Presumably, during trial, the Court will engage in further analysis concerning the extent to which extrinsic testimony is admissible concerning the prior false allegation. See *People v Jackson*, 475 Mich 909, 910; 717 NW2d 871 (2006).

decision on a motion to certify an out-of-state witness will not be reversed absent an abuse of discretion. *People v McFall*, 224 Mich App 403; 569 NW2d 828 (1997).

At defendant's preliminary examination, the complainant testified that defendant touched her vaginal area twice with his hand.

According to Doctor Yvette Phillips's counseling notes dated September 13, 2008, the complaint's father reported that she had nightmares, and that the complainant's mother had accused him of kidnapping the complainant. According to the notes, the complainant simulated phone calls that she has had with her mother and Mike, her mother's boyfriend. According to the notes from the second session, the complainant told Phillips that defendant and Mike put their penises in her mouth. According to the notes from the last session, the complainant briefly mentioned that an "impropriety" had occurred between her and defendant, and between her and Mike. The complainant also said that she did not care to talk to her mother.

However, during a protective services interview on October 30, 2008, the complainant told Hallum that she was touched in private places by defendant and another man named Mike, who was also her mother's boyfriend. The complainant said that defendant touched her with his hand, and that the touching took place at defendant's cabin in the woods.

During a February 6, 2009 interview with Lindsay Dula, the complainant said that defendant, Mike, and Carl did "really mean stuff." The complainant said that defendant touched her on her buttocks and vagina with his hand. The complainant also said that defendant touched her buttocks with his penis. Later in the interview, she seemed to deny being touched by anyone other than defendant.

"The Compulsory Process Clause of the Sixth Amendment guarantees every criminal defendant the right to present witnesses in their defense." *McFall*, 224 Mich App at 407. The uniform act to secure the attendance of out-of-state witnesses in criminal proceedings provides that if such a person is a material witness, the judge may issue a certificate under the seal of the court stating the facts and specifying the number of days the witness will be required. MCL 767.93(1). The certificate is then presented to a judge of a court of record in the county where the witness is found. *Id.* While defendant does have a fundamental right to compulsory process, this right is not absolute. *McFall*, 224 Mich App at 408. Defendant does not have the right to subpoena any and all witnesses he might wish to call. *People v Loyer*, 169 Mich App 105, 112-113; 425 NW2d 714 (1998). "[A] defendant requesting the presence of an out-of-state witness pursuant to the Uniform Act must (1) designate the proposed witness' [sic] location within a reasonable degree of certainty; (2) file a timely petition; and (3) make out a prima facie case that the witness' [sic] testimony is material." *McFall*, 224 Mich App at 409.

In the present case, the trial court found that defendant fulfilled the first two requirements. However, the court determined that defendant failed to establish that Dula, Hallum, and Phillips were material witnesses. We disagree.

The requirement that a defendant show that the witness's testimony is material comes directly from the language in MCL 767.93(1). MCL 767.93(1) requires that the person compelled be a "material witness." In interpreting MCL 767.93(1), the Legislature is presumed to have intended the meaning it plainly expressed. *People v Gardner*, 482 Mich 41, 50; 753

NW2d 78 (2008). If a term is defined by statute, that definition controls. *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007).

MCL 767.91 states that, as used in MCL 767.93(1), “[w]itness’ includes a person whose testimony is desired ... in a criminal action.” The statute does not define the term “material.” Blacks Law Dictionary defines “material” as “[h]aving some logical connection with the consequential facts[.]” Blacks Law Dictionary (8th ed), p 998. Thus, a “material witness” is a person (whose testimony is desired) that can testify about matters having some logical connection with the consequential facts. See Blacks Law Dictionary (8th ed), p 1634 (Defining “material witness”); See also *People v Mills*, 450 Mich 61, 67; 537 NW2d 909 (1995) (Defining “materiality” under MRE 401). This Court has noted that testimony that bears on another witness’ credibility alone will not elevate a person to the status of a material witness. *Loyer*, 169 Mich App at 115. This Court has also cautioned that, “a defendant’s request under the Uniform Act must be carefully scrutinized both to protect the accused’s right to compulsory process and to prevent useless or abusive issuance of process.” *McFall*, 224 Mich App at 411.

Here, there is no question that the witnesses’ testimony was desired. Defendant brought the motion at issue specifically because he desired their testimony. The decisive issue in this case is whether the trial court abused its discretion when it determined that the three witnesses were not material, i.e., that the witnesses were unable to testify about matters having some logical connection with the consequential facts.

It is clear that all three witnesses are able to testify about matters having some logical connection with the consequential facts. The testimony of these three witnesses bears heavily on the complainant’s credibility. Because of the complainant’s age, it is extremely likely that she will not acknowledge or address her prior inconsistent statements if she in fact even remembers them. If that is the case, it will be essential for defendant to use the testimony of the three witnesses as extrinsic evidence of the prior statements and subsequent inconsistent statements. Phillips’s testimony is necessary to show that the complainant accused Mike of touching her with his hand. Hallum’s testimony is necessary to show that the complainant accused Mike of putting his penis in her mouth, which was inconsistent with what she told Philips. Dula’s testimony is necessary to show that the complainant denied being touched by anyone other than defendant, which was inconsistent with what she told Philips and Hallum. Although the trial court was apparently willing to permit defendant to use transcripts and interview notes to impeach the complainant’s testimony, substituting documents for an otherwise material witness is in no way considered or permitted under MCL 767.93(1). Moreover, it would be a formidable task for defendant to meaningfully impeach a child witness with written records created by others. Defendant has a Sixth Amendment right to present these witnesses in his defense. *McFall*, 224 Mich App at 407.

The witnesses’ testimony is also material to defendant’s theories of the case. Defendant’s first theory is that the complainant is confusing defendant with Mike. On that theory, the testimony of the three witnesses is necessary as substantive evidence that she has accused Mike, and that the allegations against Mike are similar to the allegations against defendant. The three witnesses’ testimony is significantly probative in determining whether the complainant is accusing the wrong person, because the three witnesses are the only ones who observed her demeanor and behavior during her accusation and subsequent exculpation of Mike. For these

reasons, defendant has a Sixth Amendment right to present these witnesses in his defense. *McFall*, 224 Mich App at 407.

Defendant's second theory is that the complainant originally fabricated the allegations against defendant to escape her mother's custody. Defendant believes that in the fall of 2008, when there was a risk that the complainant might be returned to her mother, she fabricated a new allegation against Mike to shield her return. Defendant postulates that when the risk of return passed, the complainant forgot about the allegations she made against Mike. On this theory, the three witnesses' testimony is probative of the complainant's relationship with her mother before and after the fall of 2008. All three witnesses can testify to statements the complainant made during the interviews about her relationship with her mother. Phillips's interview notes indicate that the complainant did not care to talk to her mother, and that her mother had apparently told her that her father had kidnapped her. During the interview with Hallum, the complainant accused her mother of attempting to kidnap her. Finally, during the interview with Dula, the complainant said her "mean mom" leaves her at home and "goes out and parties." This testimony is material evidence in support of defendant's theory as to the complainant's motive for fabrication, and defendant has a Sixth Amendment right to present these witnesses in his defense. *McFall*, 224 Mich App at 407. Because the three witnesses are able to testify about matters having some logical connection with the consequential facts, we find that the trial court abused its discretion in finding that the three witnesses were not material witnesses.

In sum, in Docket Number 290372, the trial court properly denied plaintiff's motion in limine. In Docket Number 291655, the trial court abused its discretion by denying defendant's motion to certify the material of out of state witnesses.

Affirmed in part, reversed in part, and remanded for further proceedings. Jurisdiction is not retained.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering